Supreme Court, U.S.
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99-1848

IN THE
SUPREME COURT OF THE UNITED STATES

BUCKHANNON BOARD & CARE HOME, INC.; THE WEST VIRGINIA RESIDENTIAL BOARD AND CARE HOME ASSOCIATION; DORSEY PIECE; and on behalf of all others similarly situated,

Petitioners,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, et al.,

Respondents.

RESPONDENT, WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fourth Circuit erred in its interpretation of *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992), in *S-1 and S-2 v. State Board of Education*, 21 F.3d 49 (4th Cir.) (en banc), *cert. denied*, 513 U.S. 876, 115 S.Ct. 205, 130 L.Ed.2d 135 (1994), in concluding that the "catalyst theory" is no longer available for civil rights plaintiffs to recover attorneys' fees.

2. Whether a Plaintiff can prevail through catalyst theory alone.

3. Whether Petitioners obtained an enforceable judgment or other comparable relief against Respondents through a consent decree or settlement which entitles them to attorneys' fees.

THE PARTIES

The following were parties in the United States Court of Appeals: Joan E. Ohl, Secretary, West Virginia Department of Health and Human Resources; Office of Health Facility Licensure and Certification; John Wilkinson, Director, Office of Health Facility Licensure and Certification; Sandra L. Daubman, Residential Programs Manager, Office of Health Facility Licensure and Certification (Daubman has been replaced by Gloria Pauley); West Virginia Office of the State Fire Marshal, Walter Smittle, Fire Marshal; Cecil Underwood, in his official capacity as Governor of the State of West Virginia; State of West Virginia; West Virginia State Fire Commission; John Beaty, II, Commissioner; Joseph J. Bostar, III, Commissioner; Randy Breeden, Commissioner; James W. Fife, Commissioner; Francis A. Guffey, II, Commissioner; Daniel Hess, Commissioner; Gregory Alan Lay, Commissioner; David L. Tolliver, Commissioner; Stephen C. McBee, Commissioner; Bill L. Spencer, Commissioner; Victor Stallard, Jr., Commissioner; J. D. Waggoner, Commissioner; and Kenneth Morgan, Commissioner.

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99-1848

IN THE
SUPREME COURT OF THE UNITED STATES

BUCKHANNON BOARD & CARE HOME, INC.; THE WEST VIRGINIA RESIDENTIAL BOARD AND CARE HOME ASSOCIATION; DORSEY PIECE; and on behalf of all others similarly situated,

Petitioners,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, et al.,

Respondents.

RESPONDENT, WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

BASIS FOR JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) with Petitioners' filing of a petition for writ of certiorari on May 12, 2000.

The United States District Court for the Northern District of West Virginia, Judge Stamp, on January 29, 1999, entered an Order denying Petitioners' Motion for Attorneys Fees (JA 320) to which Petitioners appealed to the United States Court of Appeals for the

Fourth Circuit. On January 20, 2000, the Fourth Circuit entered judgment affirming the District Court's denial of Petitioners' Motion for Attorneys' Fees. (App. 1). The Fourth Circuit, on February 15, 2000, denied Petitioners' Petition for Rehearing. (App.7).

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fourth Circuit, Docket No. 99-1424, is dated January 20, 2000.

The unreported opinion of the United States District Court for the Northern District of West Virginia, Civil Action No. 2:96CV106, is dated January 29, 1999.

By Order entered January 29, 1999, United States District Court Judge Stamp held this action had been rendered moot by the passage of House Bill 4200 and Senate Bill 627. (JA 320.) He further determined that Petitioners were not entitled to attorney fees and costs as prevailing parties under the "catalyst theory," nor did a bad-faith exception apply. (JA-327-30.) Pursuant to Fed. R. Civ. P. 11(c)(1)(B), Judge Stamp did determine that Rule 11 sanctions were warranted based on the State Fire Marshal's failure to disclose to the Petitioners earlier on that he was going to propose the deletion of the self-preservation requirements and ordered payment of fees and costs to Petitioners in the amount of $3,252.00. (JA 335.)

STATEMENT OF THE CASE

Pursuant to Sup. Ct. R. 24(2), Respondents are satisfied with the presentation of Petitioners' Statement of the Case, except for the allegations that the Fourth Circuit's opinion that attorneys' fees are not available under the "catalyst theory" is contrary to this Court's ruling in *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566, 121 L.E.2d 494 (1992), rendered in *S-1 and S-2 v. State Bd. of Educ.*, 21 F.3d 49

(4th Cir. 1994) (en banc), *cert. denied*, 513 U.S. 876, 115 S.Ct. 205, 130 L.Ed. 135 (1994).

SUMMARY OF ARGUMENT

The Petitioners have not obtained an enforceable judgment or other comparable relief through a consent decree or settlement. This lawsuit cannot be said to be the catalyst for the deletion of the "self-preservation" requirements from W. Va. Code § 16-5H-2(3) (1996) or 64 C.S.R. 65-3.14 (Aug. 1, 1997). The catalyst theory alone cannot serve as the basis for Petitioners' claim to prevailing party status. Therefore, Petitioners are not entitled to attorneys' fees.

REASONS FOR DENYING THE WRIT

A. The United States Court of Appeals for the Fourth Circuit Has Not Misinterpreted this Court's Ruling in *Farrar v. Hobby*.

Petitioners are asking this Court to reverse the Fourth Circuit's interpretation of *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992), rendered in *S-1 and S-2 v. State Bd. of Educ.*, 21 F.3d 49 (4th Cir. 1994) (en banc), *cert. denied*, 513 U.S. 876, 115 S.Ct. 205, 130 L.Ed.2d 135 (1994), and *Statewide Reapportionment Advisory Committee v. Beasley*, 99 F.2d 134 (4th Cir. 1996), *cert. denied*, 520 U.S. 1166 (1997), concluding that the "catalyst theory" is not available for civil rights plaintiffs to recover attorneys' fees and costs. Secondly, Petitioners are asking this Court to remand this case back to the District Court with instructions to consider Petitioners' Motion for Attorney Fees.

In *Farrar*, this Court announced a distinctly new test: The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought or comparable relief through a consent decree or settlement. Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement.

Otherwise the judgment or settlement cannot be said to "affec[t] the behavior of the defendant toward the plaintiff." Only under these circumstances can civil rights litigation affect "the material alteration of the legal relationship of the parties" and thereby transform the plaintiff into a prevailing party. *Id.* 113 S.Ct. at 573 (alteration in original) (citations omitted). This Court emphasized that "[n]o material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant." *Id.* at 574. Under *Farrar*, a nominal damages judgment was entered. And this Court held that the nominal damages judgment, being legally enforceable, conferred prevailing party status. *Id.* at 574. This Court cautioned, however, that sometimes "even a plaintiff who formally 'prevails' under Section 1988 should receive no attorney's fees at all." *Id.* at 575. In other words, no longer will the prevailing party inquiry turn on the magnitude of relief. *See id.* at 574 (noting that "the 'technical' nature of a nominal damages award or any other judgment does not affect the prevailing party inquiry"). So, under *Farrar*, a technical victory renders a plaintiff a prevailing party, but will not necessarily entitle the plaintiff to fees.

For years after the passage of the Civil Rights Attorney's Fee Awards Act of 1976, 90 Stat. 2641 (1976) (codified, as amended, 42 U.S.C. § 1988), case law held that, although a plaintiff need not obtain formal relief to recover fees, the plaintiff must enjoy "substantial or essential" success in obtaining the objective of the suit, and the suit must be a proximate cause of any relief obtained. *See Maher v. Gagne*, 448 U.S. 122, 129, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980). In *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), this Court suggested without deciding that plaintiffs may become prevailing parties for fee purposes by succeeding on "any significant issue in litigation which achieves some of the benefit the parties sought in brining suit" (internal quotation marks omitted), this causation-centered test of prevailing party statutes became known as the "catalyst theory."

The lower federal courts agreed that a plaintiff claiming prevailing party status through informal success must demonstrate a casual connection between the lawsuit and the favorable result; however, the lower courts were split on whether the plaintiff must also demonstrate some merit to the lawsuits' claims. The Fourth Circuit was in the minority with its decision in *Bonnes v. Long*, 599 F.2d 1316 (4th Cir. 1979), *overruled by S-1 and S-2*, 21 F.3d 49 (4th Cir. 1994), which held plaintiff's unadjudicated claim had to meet a substantiality threshold.

This Court then decided a series of cases on prevailing party status under 42 U.S.C. § 1988. *See Hewitt v. Helms*, 482 U.S. 755, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987) (a judicial pronouncement constitutes relief on the merits only if it settles some dispute which affects the behavior of the defendant toward the plaintiff); *Rhodes v. Stewart*, 488 U.S. 1, 109 S.Ct. 202, 102 L.Ed.2d 1 (1988) (per curiam) (a declaratory judgment constitutes relief, for purposes of § 1988, if, and only if, it affects the behavior of the defendant toward the plaintiff; however, these plaintiffs received no relief because the case was moot before judgment); *Texas State Teachers Ass'n v. Garland Independent School District*, 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989) (to be considered a prevailing party, the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant).

Then, in 1992, this Court decided *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992). In *Farrar*, the plaintiff alleged due process violations and malicious prosecution in connection with the closing of his school for disabled teens. The plaintiff sought $17 million in damages, but was awarded only nominal damages. The District Court awarded the plaintiff $280,000 in fees plus expenses and interest. A divided Fifth Circuit ruled that the nominal damages award did not in any meaningful sense change the legal relationship between the parties. This Court held that the Fifth Circuit erred in not recognizing the plaintiffs as prevailing parties under the settled principle that plaintiffs, who obtain only

nominal or modest relief, are considered prevailing parties for fee-award purposes. This Court reaffirmed *Garland's* "legal relationship" test and added the language at issue in *S-1 and S-2* when it stated, "[n]o material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent degree, or settlement against the defendant." *Farrar*, 113 S.Ct. at 574. This Court upheld the Fifth Circuit's reversal of the District Court's fee award holding that the amount of the fee award depends on the degree of success achieved. This Court noted that "[t]his litigation accomplished little beyond giving petitioners 'the moral satisfaction of knowing that a federal court concluded that [their] rights had been violated' in some unspecified way." *Id.* at 574 (quoting *Hewitt v. Helms*, 482 U.S. 755, 762, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987)).

In *Farrar v. Hobby*, this Court created a more demanding test for prevailing party status, which clearly discards catalyst theory from the prevailing party inquiry. In a five-to-four decision, this Court affirmed the Fifth Circuit's denial of fees and noted that the threshold requirement of prevailing party status serves the congressional intent to permit fee awards "'only when a party has prevailed on the merits.'" *Farrar*, 113 S.Ct. at 569, 572.

Petitioners argue in their reasons for granting their Writ that the United States Court of Appeals for the Fourth Circuit has misinterpreted this Court's opinion in *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992). Respondents submit that the Fourth Circuit did not misinterpret *Farrar*, in spite of all other United States Court of Appeals decisions to the contrary. *See Paris v. United States Dep't of Housing and Urban Development*, 988 F.2d 236, 238 (1st Cir. 1993); *Marbley v. Bane*, 57 F.3d 224, 234 (2nd Cir. 1995); *Baumgartner v. Harrisburg Housing Authority*, 21 F.3d 541, 546-550 (3rd Cir. 1994); *Foreman v. Dallas County*, 193 F.3d 314 (5th Cir. 1999), *cert. denied*, __ U.S. __, 120 S.Ct. 1673, 146 L.Ed.2d 482; *Citizens Against Tax Waste v. Westerville City School*, 985 F.2d 255, 257 (6th Cir. 1993); *Zinn v. Shalala*, 35

F.3d 273, 276 (7th Cir. 1994); *Little Rock School Dist. v. Pulaski County Special Sch. Dist. #1*, 17 F.3d 260, 263, n.2 (8th Cir. 1994); *Kilgour v. Pasadena*, 53 F.3d 1007, 1010 (9th Cir. 1995); *Beard v. Teska*, 31 F.3d 942, 951-952 (10th Cir. 1994); *Morris v. West Palm Beach*, 194 F.3d 1203, 1207 (11th Cir. 1999).

All Circuit Court of Appeals, but for the Fourth Circuit, have recognized a conflict between *Farrar* and catalyst theory, but have taken pains to invent implausible solutions to the problem. Although both the United States Court of Appeals for the First Circuit and the Sixth Circuit applied the catalyst theory to grant prevailing party status to plaintiffs, each failed to acknowledge the potential impact of *Farrar's* enforceable judgment requirement. *See, Paris v. United States Dep't of Housing and Urban Development*, 988 F.2d 236, 240-41 (1st Cir. 1993); *Citizens Against Tax Waste v. Westerville City Sch.*, 985 F.2d 255, 257-58, n.3 (6th Cir. 1993). Similarly, the Fifth Circuit, when confronted with a catalytic fee claim, circumvented the enforceable judgment standard by limiting *Farrar* to "the context of nominal damages." *See, Pembroke v. Wood County*, 981 F.2d 225 (5th Cir. 1993), *cert. denied*, 508 U.S. 973, 113 S.Ct. 2965, 125 L.Ed.2d 665 (1993) ("*Farrar* dealt with prevailing party status and the award of attorney's fees in the context of nominal damages and is thus distinguishable from the present case.").

The question of the catalyst theory's continued survival emerged more directly when this Court summarily vacated and remanded two cases that had applied the theory to uphold plaintiffs' prevailing party status. *See, American Council of the Blind v. Romer*, 506 U.S. 1075, 113 S. Ct. 1038, 122 L.Ed.2d 348 (1993), *vacating* 962 F.2d 1501 (10th Cir. 1992); *Klolodzieczak v. Friend*, 113 S.Ct. 1038, 506 US 1075, 122 L.Ed. 348 (1993), *vacating* 965 F.2d 682 (9th Cir. 1992). The lower courts were directed to reconsider their decisions and apply *Farrar*. *American Council*, 113 S.Ct. at 1038; *Kolodzieczak*, 113 S.Ct. at 1038. The United States Court of Appeals for the Tenth Circuit conceded that *Farrar* might

seem to prevent plaintiffs from using catalyst theory to gain prevailing party status. *See American Council of the Blind v. Romer,* 992 F.2d 249, 251 (10th Cir. 1993) (alternative holding) ("Perhaps [under] *Farrar* the 'catalyst rule' should . . . not [apply] to the prevailing party [inquiry]."). Ultimately, that court determined otherwise and applied the catalyst theory. *See id.* ("It does not appear that the decision in *Farrar* condemns the use of the 'catalyst rule' in a nonjudgment on the merits situation."). The United States Court of Appeals for the Ninth Circuit simply remanded to the district court for reconsideration under *Farrar. See, Friend v. Kolodzieczak,* 992 F.2d 243 (9th Cir. 1993). The United States Court of Appeals for the Eighth Circuit declined to apply *Farrar* "beyond its context of determining prevailing party status after a final determination on the merits of litigation." *See Little Rock School District v. Pulaski County Special Sch. Dist #1*, 17 F.3d 260, 263, n.2 (8th Cir. 1994). The United States Court of Appeals for the Third Circuit similarly attempted to resolve the inconsistency between *Farrar* and the catalyst theory. *See Baumgartner v. Harrisburg Hous. Auth.,* 21 F.3d 541, 547 (3rd Cir. 1994). It reasoned that *Farrar* involved a fee claim supported by a judgment, so the "situation" before the Supreme Court did not involve catalyst theory. *See id.* "Therefore, any language implicating the 'catalyst theory' was dictum." *See id.*

The Fourth Circuit addressed the viability of the "catalyst theory" after *Farrar* in *S-1 and S-2 v. State Bd. of Educ.*, 21 F.3d 49 (4th Cir. 1994), and declared that the catalyst theory was no longer available to litigants in this circuit in fee-shifting cases. *See also Statewide Reapportionment Advisory Committee v. Beasley*, 99 F.3d 134 (4th Cir. 1996), *cert. denied* 520 U.S. 1166 (1997); *Arvinger v. Mayor and City Council of Baltimore*, 31 F.3d 196 (4th Cir. 1994). In *S-1 and S-2*, the Fourth Circuit adopted the dissenting opinion of

Judge Wilkinson from its previous *S-1 and S-2*[1] and ruled that "[a] person may not be a 'prevailing party' plaintiff under 42 U.S.C. § 1988 except by virtue of having obtained an enforceable judgment, consent decree, or settlement giving some of the legal relief sought in § 1983 action. *S-1 and S-2*, 21 F.3d at 50, *citing Farrar*, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992). That Court also ruled "[t]he fact that a lawsuit may operate as a catalyst for post-litigation changes in a defendant's conduct cannot suffice to establish plaintiff as a prevailing party." Catalyst theory, "allowing that result, is no longer available for the purpose. *See Farrar*, 506 U.S. at __, and cases such as *Bonnes v. Long*, 599 F.2d 1316 (4th Cir. 1979), which applied that theory, are overruled." *S-1 and S-2,* 21 F.3d at 51.

B. Petitioners Did Not Obtain an Enforceable Judgment or Other Comparable Relief Through a Consent Decree or Settlement Against Respondents Which Entitles Them to Attorneys' Fees.

Petitioners clearly did not obtain an enforceable judgment or other comparable relief through a consent decree or settlement against Respondents which entitles them to attorneys' fees.

Petitioners' reliance upon *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, ___ U.S. ___, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) is a misplaced attempt to circumvent the unequivocal *Farrar* requirement that prevailing party status requires a fee claimant to be entitled to enforce a judgment, consent decree, or settlement. All nine of the Justices applied the enforceable judgment requirement in *Farrar. See Farrar*, 113 S.Ct. at 576 (O'Connor, J., concurring) (noting that Farrar met the "minimum condition for prevailing party status because he obtained

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[1] *S-1 and S-2 v. State Bd. of Educ.*, 6 F.3d 160 (4th Cir. 1993), *vacated* 21 F.3d 49 (4th Cir. 1994) (en banc).

an enforceable judgment") *id.* at 579 (White, J., concurring in part and dissenting in part). ("Because Farrar won an enforceable judgement . . . he is a 'prevailing party' under the statue." (Citation omitted)). Farrar was awarded nominal damages. Petitioners in the instant matter have been awarded no damages. Petitioners have won no enforceable judgment against the West Virginia Department of Health and Human Resources. Even the Fed. R. Civ. P. 11 sanction award was against the State Fire Marshal, not the Department.

Respondents submit that the list of ways to earn prevailing party status is exclusive, and that a plaintiff can no longer prevail through catalyst theory alone. Respondents submit that there has been no enforceable judgment or comparable relief through a consent decree or settlement which would quality Petitioners as a prevailing party. *Farrar v. Hobby*, 113 S.Ct. at 573. Whatever relief the Petitioners secured must directly benefit them at the time of the judgment. Otherwise, the judgment cannot be said to "affec[t] the behavior of the defendant toward the plaintiff." *Id.* at 111 (internal citations omitted). The present case was dismissed as moot. Petitioners obtained no judgment. There was no settlement. Their suit cannot still be a catalyst for change and for the recovery of attorneys' fees. It is further submitted that Respondent's voluntary change in conduct should not be "a license to shake down government officials." *S-1 and S-2*, 6 F.3d at 172, *citing Farrar*, 506 U.S. at 122.

The Fourth Circuit correctly interpreted that *Farrar* prevents a plaintiff from prevailing through the catalyst theory alone, but must also meet the enforceable judgment requirement. Petitioners in this case have never met the enforceable judgement requirement.

CONCLUSION

The Court should deny the Petition for Writ of Certiorari, and affirming the holding of the Fourth Circuit in *S-1 and S-2*.

Respectfully submitted,

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES/ OFFICE OF HEALTH FACILITY LICENSURE AND CERTIFICATION

Respondents,
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August 8, 2000

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BUCKHANNON BOARD AND CARE HOME, INCORPORATED; THE WEST VIRGINIA RESIDENTIAL BOARD AND CARE HOME ASSOCIATION; DORSEY PIERCE, by her next friend, Lockie J. Marple, and on behalf of all others similarly situated,

Plaintiffs-Appellants,

and

ALMOST HOME, INCORPORATED; DAISY LAYMAN, by her next friend, Faye Byers,
Plaintiffs,

v. No. 99-1424

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES; GRETCHEN O. LEWIS, Secretary, West Virginia Department of Health and Human Resources; OFFICE OF HEALTH FACILITY LICENSURE AND CERTIFICATION; NANCY TYLER, Director, Office of Health Facility Licensure and Certification; SANDRA L. DAUBMAN, Program Manager, Office of Health Facility Licensure and Certification; WEST VIRGINIA OFFICE OF THE STATE FIRE MARSHAL; WALTER SMITTLE, Fire Marshal; GASTON CAPERTON, in his official capacity as Governor of the State of West Virginia; STATE OF WEST VIRGINIA; WEST VIRGINIA STATE FIRE COMMISSION; JOHN BEATY, II, Commissioner; JOSEPH J. BOSTAR, III, Commissioner; RANDY BREEDON, Commissioner JAMES W.

FIFE, Commissioner; FRANCIS A. GUFFEY, II, Commissioner; DANIEL HESS, Commissioner; GREGORY ALAN LAY, Commissioner; DAVID L. TOLLIVER, Commissioner; STEPHEN C. McBEE, Commissioner; BILL L. SPENCER, Commissioner; VICTOR STALLARD, JR., Commissioner; J. D. WAGGONER, Commissioner; KENNETH MORGAN, Commissioner; JOAN E. OHL, Secretary, Department of Health and Human Resources; JOHN WILKENSON, Director, Office of Health Facility Licensure and Certification; CECIL H. UNDERWOOD, Governor, State of West Virginia,

Defendants-Appellees,

and

WEST VIRGINIA STATE BOARD OF EXAMINERS FOR REGISTERED PROFESSIONAL NURSES; LAURA S. RHODES, Executive Director, West Virginia State Board of Examiners for Registered Professional Nurses,

Defendants.

Appeal from the United States District Court
for the Northern District of West Virginia, at Elkins.
Frederick P. Stamp, Jr., Chief District Judge.
(CA-96-106-2)

Argued: December 2, 1999

Decided: January 20, 2000

Before NIEMEYER and MOTZ, Circuit Judges,
and BUTZNER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Webster J. Arceneaux, III, LEWIS, FRIEDBERG, GLASSER, CASEY & ROLLINS, L.L.P., Charleston, West Virginia, for Appellants. David Paul Cleek, OFFICE OF THE ATTORNEY GENERAL, Charleston, West Virginia; Charlene Ann Vaughan, Deputy Attorney General, WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN SERVICES, Charleston, West Virginia, for Appellees. **ON BRIEF:** Sandra K. Henson, LEWIS, FRIEDBERG, GLASSER, CASEY & ROLLINS, L.L.P., Charleston, West Virginia, for Appellants. Darrell V. McGraw, Jr., Attorney General, Chad M. Cardinal, Assistant Attorney General, Charleston, West Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

The appellants in this case ask us to reexamine our holding in *S-1 and S-2 v. State Board of Education of North Carolina*, 21 F.3d 49 (4th Cir. 1994) (en banc), which rejected the catalyst theory when determining whether to award attorneys fees under federal statutes making fees awardable to prevailing parties. As a three-judge panel of the court, however, we are bound by our precedent. *See Joseph v. Angelone*, 184 F.3d 320, 324-25 (4th Cir. 1999). Accordingly, we affirm the judgment of the district court that relied on *S-1 and S-2* in denying appellants' motion for attorneys fees.

Buckhannon Board and Care Home, Inc. ("Buckhannon"), which operates residential care homes for elderly people who require some assistance in the activities of daily living, failed an inspection by the West Virginia Office of the State Fire Marshal because it housed residents incapable of self-preservation, in violation of West Virginia law. *See* W. Va. Code § 16-5H-2 (1998) (requiring that all residents of residential board and care homes be capable of self-preservation). Buckhannon and other plaintiffs commenced this action for a declaratory judgment that the state law violated the Fair Housing Amendments Act ("FHAA"), 42 U.S.C. § 3601 *et seq.*, and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*

While the action was pending, West Virginia amended state law to delete the self-preservation requirement. None of the defendants, however, informed the plaintiffs or the court of the pending amendments. Indeed, the district court noted that the defendants did not even inform their own attorney, who was representing them in this action. As a result of the amendments, this action became moot, and the district court dismissed it.

Although Buckhannon did not obtain the change in state law through an enforceable judgment, consent decree, or settlement, it claimed nevertheless that it was the prevailing party entitled to attorneys fees under the FHAA and the ADA. *See* 42 U.S.C. § 3613(c)(2) 42 U.S.C. § 12205. Buckhannon argued that under a catalyst theory it obtained the relief it sought through the defendants' voluntary conduct because it filed this action and brought to the state's attention the flaws in its law. The district court observed that if the catalyst theory were available in this circuit, the plaintiffs "might prevail." However, because this circuit had rejected the catalyst theory in *S-1 and S-2*, the district court denied the plaintiffs' motion for attorneys fees.

On this appeal, the appellants challenge "only the district court's ruling on the disallowance of attorneys fees and costs under the 'catalyst theory.'" They urge us to reexamine our decision in *S-1 and S-2*, which, they acknowledge, would, if applied, require rejection of their appeal.

The Fourth Circuit has determined that panels of the court are bound by the prior decisions of the court, *en banc* or in panel, and that binding precedent can be reversed only by the court *en banc*. *See Joseph*, 184 F.3d at 325 ("As a panel, we are not authorized to reconsider an *en banc* holding even if we happen to be so inclined, which we are not"); *Busby v. Crown Supply, Inc.*, 896 F.2d 833, 840-41 (4th Cir. 1990) ("[A] panel considers itself bound by the prior decision of another panel, absent an *in banc* overruling or a superseding contrary decision of the Supreme Court").

In *S-1 and S-2*, we held that in order to qualify as a "prevailing party" in litigation, the plaintiff must, through the litigation, "'obtain an enforceable judgment . . . or comparable relief through a consent decree or settlement.'" *S-1 and S-2 v. State Board of Education of North Carolina*, 6 F.3d 160, 168 (4th Cir. 1993) (Wilkinson, J., dissenting) (quoting *Farrar v. Hobby*, 506 U.S. 103, 111 (1992)), *vacated*, 21 F.3d 49 (1994) (*en banc*) (adopting Judge

Wilkinson's dissent as the majority opinion). Because the plaintiffs did not bring about the change in West Virginia law through any judgment, decree, or settlement, we conclude that the district court properly applied *S-1 and S-2* to this case. Accordingly, the judgment of the district court

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
February 15, 2000

NO. 99- 1424
CA-96-106-2

BUCKHANNON BOARD AND CARE HOME, INC; THE WEST VIRGINIA RESIDENTIAL BOARD AND CARE HOME ASSOCIATION; DORSEY PIERCE, by her next friend, Lockie J. Marple, and on behalf of all others similarly situated,

Plaintiffs - Appellants,

and

ALMOST HOME, INCORPORATED; DAISY LAYMAN, by her next friend, Faye Byers

Plaintiffs

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES; GRETCHEN O. LEWIS, Secretary, West Virginia Department of Health and Human Resources; OFFICE OF HEALTH FACILITY LICENSURE AND CERTIFICATION; NANCY TYLER, Director, Office of Health Facility Licensure and Certification; SANDRA L. DAUBMAN, Program Manager, Office of Health Facility Licensure and Certification; WEST VIRGINIA OFFICE OF THE STATE FIRE MARSHAL; WALTER SMITTLE, Fire Marshal; GASTON CAPERTON, in his official capacity as Governor of the State of West Virginia; STATE OF WEST VIRGINIA, WEST VIRGINIA STATE FIRE COMMISSION;

JOHN BEATY, II, Commissioner; JOSEPH J. BOSTAR, III, Commissioner; RANDY BREEDEN, Commissioner, JAMES W. FIFE, Commissioner; FRANCIS A. GUFFEY, II, Commissioner; DANIEL HESS, Commissioner; GREGORY ALAN LAY, Commissioner; DAVID L. TOLLIVER, Commissioner; STEPHEN C. MCBEE, Commissioner; BILL L. SPENCER, Commissioner; VICTOR STALLARD, JR., Commissioner; J. D. WAGGONER, Commissioner; KENNETH MORGAN, Commissioner; JOAN E. OIL, Secretary Department of Health and Human Resources; JOHN WILKINSON, Director, Office of Health Facility Licensure and Certification; CECIL H. UNDERWOOD, Governor, State of West Virginia

Defendants - Appellees

WEST VIRGINIA STATE BOARD OF EXAMINERS FOR REGISTERED PROFESSIONAL NURSES; LAURA S. RHODES, Executive Director, West Virginia State Board of Examiners for Registered Professional Nurses

Defendants

On Petition for Rehearing and Rehearing En Banc

Appellants' petition for rehearing and rehearing on en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied

For the Court,

/s/ Patricia S. Conner

Clerk